
STATUTORY INSTRUMENTS

2008 No. 794

The Employment and Support Allowance Regulations 2008

PART 10

INCOME AND CAPITAL

CHAPTER 6

Other income

Notional income – deprivation and income on application

106.—(1) A claimant is to be treated as possessing income of which the claimant has deprived himself or herself for the purpose of securing entitlement to an employment and support allowance or increasing the amount of that allowance, or for the purpose of securing entitlement to, or increasing the amount of, income support or a jobseeker's allowance.

(2) Except in the case of—

- (a) a discretionary trust;
- (b) a trust derived from a payment made in consequence of a personal injury;
- (c) an employment and support allowance;
- (d) a jobseeker's allowance;
- (e) working tax credit;
- (f) child tax credit;
- (g) a personal pension scheme, occupational pension scheme or a payment made by the Board of the Pension Protection Fund where the claimant [^{F1}has not attained the qualifying age for state pension credit];

[^{F2}(ga) any sum to which paragraph (9) applies;]

[^{F3}(gb) any sum to which regulation 137(4A) (treatment of student loans) applies;]

- (h) any sum to which paragraph 43(2)(a) of Schedule 9 (capital to be disregarded) applies which is administered in the way referred to in paragraph 43(1)(a) of that Schedule;
- (i) any sum to which paragraph 44(a) of Schedule 9 refers; or
- (j) rehabilitation allowance made under section 2 of the Employment and Training Act 1973,

income which would become available to the claimant upon application being made but which has not been acquired by the claimant is to be treated as possessed by the claimant but only from the date on which it could be expected to be acquired were an application made.

(3) A claimant who has attained the [^{F4}qualifying age for state pension credit] is to be treated as possessing—

- (a) the amount of any income from an occupational pension scheme, a personal pension scheme or the Board of the Pension Protection Fund—

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(i) for which no claim has been made; and
 (ii) to which the claimant might expect to be entitled if a claim for it were made;
 (b) income from an occupational pension scheme which the claimant elected to defer, but only from the date on which it could be expected to be acquired were an application for it to be made.

(4) This paragraph applies where a claimant [^{F5}who has attained the qualifying age for state pension credit]—

- (a) is entitled to money purchase benefits under an occupational pension scheme or a personal pension scheme;
- (b) fails to purchase an annuity with the funds available in that scheme; and
- (c) either—
 - (i) defers in whole or in part the payment of any income which would have been payable to the claimant by that claimant's pension fund holder; or
 - (ii) fails to take any necessary action to secure that the whole of any income which would be payable to the person by that claimant's pension fund holder upon the person applying for it, is so paid; or
 - (iii) income withdrawal is not available to the claimant under that scheme.

(5) Where paragraph (4) applies, the amount of any income foregone is to be treated as possessed by that claimant, but only from the date on which it could be expected to be acquired were an application for it to be made.

(6) The amount of any income foregone in a case where paragraph (4)(c)(i) or (ii) applies is to be the [^{F6}rate of the annuity which may have been purchased with the fund] and is to be determined by the Secretary of State who will take account of information provided by the pension fund holder in accordance with regulation 7(5) of the Social Security (Claims and Payments) Regulations 1987^{F7}.

(7) The amount of any income foregone in a case where paragraph (4)(c)(iii) applies is to be the income that the claimant could have received without purchasing an annuity had the funds held under the relevant occupational or personal pension scheme been held under a scheme where income withdrawal was available and is to be determined in the manner specified in paragraph (6).

(8) In paragraph (4), “money purchase benefits” has the meaning it has in section 181 of the Pension Schemes Act 1993^{F8}.

[^{F9}(9) Paragraphs (1) and (2) do not apply in respect of any amount of income other than earnings, or earnings derived from employment as an employed earner, arising out of the [^{F10}claimant participating as a service user].]

Textual Amendments

- F1** Words in reg. 106(2)(g) substituted (6.4.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 2\) Regulations 2010 \(S.I. 2010/641\)](#), regs. 1(1), **12(4)(a)**
- F2** Reg. 106(2)(ga) inserted (for specified purposes and with effect in accordance with reg. 1(2) of the amending S.I.) by [The Social Security \(Miscellaneous Amendments\) \(No. 4\) Regulations 2009 \(S.I. 2009/2655\)](#), regs. 1(2)(d), **11(8)(a)**
- F3** Reg. 106(2)(gb) inserted (1.11.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 5\) Regulations 2010 \(S.I. 2010/2429\)](#), regs. 1(2), **11(2)**
- F4** Words in reg. 106(3) substituted (6.4.2010) by [The Social Security \(Miscellaneous Amendments\) \(No. 2\) Regulations 2010 \(S.I. 2010/641\)](#), regs. 1(1), **12(4)(b)**

- F5** Words in reg. 106(4) substituted (6.4.2010) by The Social Security (Miscellaneous Amendments) (No. 2) Regulations 2010 (S.I. 2010/641), regs. 1(1), **12(4)(c)**
- F6** Words in reg. 106(6) substituted (16.11.2017) by The Social Security (Miscellaneous Amendments No. 4) Regulations 2017 (S.I. 2017/1015), regs. 1(2), **13**
- F7** S.I. 1987/1967, relevant amending instruments are S.I. 1999/2572 and S.I. 2003/492.
- F8** 1993 c. 48. The definition in section 181 was amended by S.I. 2005/2053.
- F9** Reg. 106(9) added (for specified purposes and with effect in accordance with reg. 1(2) of the amending S.I.) by The Social Security (Miscellaneous Amendments) (No. 4) Regulations 2009 (S.I. 2009/2655), regs. 1(2)(d), **11(8)(b)**
- F10** Words in reg. 106(9) substituted (29.10.2013) by The Social Security (Miscellaneous Amendments) (No. 3) Regulations 2013 (S.I. 2013/2536), regs. 1(1), **13(28)**

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